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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 284

[FNS–2020–0028]

RIN 0584-AE80

Supplemental Nutrition Assistance Program: Pandemic Electronic Benefits Transfer (P-EBT) Integrity

AGENCY: Food and Nutrition Service (FNS), Agriculture Department (USDA).

ACTION: Final rule.

SUMMARY: The Food and Nutrition Service (FNS or the Agency), an agency of the U.S Department of Agriculture (USDA or the Department), is issuing a final rule to add regulations that will ensure the integrity of the supplemental allotments created by Section 1101 of the Families First Coronavirus Response Act (FFCRA), as amended by the Continuing Appropriations Act, 2021 and Other Extensions Act (CR) for households with children who would have otherwise received free or reduced price school meals under the Richard B. Russell National School Lunch Act, but for school closures or reduction in the number of days or hours that students attend school in response to the ongoing and national Coronavirus Disease 2019 (COVID-19) Public Health Emergency. Such allotments are referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits. The CR extended the authority for P-EBT through Fiscal Year (FY) 2021, and also authorized P-EBT for households with at least one child enrolled in a covered child care facility (as defined by Section 1101(i)(1) of the FFCRA, as amended) and the supplemental nutrition assistance program (SNAP) when the covered child care facility is closed

or has reduced attendance or hours or one or more schools in the area of the covered child care facility are closed or have reduced attendance or hours. This final rule would also safeguard the integrity of SNAP, as P-EBT operates within the SNAP infrastructure. USDA FNS is responsible for administering P-EBT and SNAP at the Federal level.

DATES: *Effective Date:* This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Notice Date: Within 10 calendar days of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], SNAP authorized firms shall be notified of the contents of this final rule.

FOR FURTHER INFORMATION CONTACT: Andrea Gold, the SNAP Retailer Policy and Management Division, USDA FNS at SM.FN.RPMDHQ-WEB@usda.gov; 703.305.2434.

SUPPLEMENTARY INFORMATION:

Executive Summary

Background Information

Establishment of P-EBT

On January 31, 2020, Secretary Azar of the U.S. Department Health and Human Services (HHS) declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to the Coronavirus Disease 2019 (COVID-19). On March 13, 2020, President Trump declared the ongoing COVID-19 outbreak in the U.S. to be a national emergency. Due to COVID-19, many schools nationwide began closing in March 2020. In order to provide some financial relief to families, on March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127). Section 1101 of the FFCRA, as originally enacted, authorized USDA to approve State plans to provide federally

funded food assistance to each household containing at least one child who would have received free or reduced price school meals, but for school closures lasting at least five consecutive days during a public health emergency declaration. The U.S. Department of Agriculture (USDA or the Department) refers to these benefits created by Section 1101 of the FFCRA as Pandemic Electronic Benefits Transfer (P-EBT) benefits. The Continuing Appropriations Act, 2021 and Other Extensions Act (CR; Pub. L. 116-159) amended Section 1101 of the FFCRA to extend the authority for P-EBT through FY 2021 (which would cover portions of School Years 2020/2021 and 2021/2022) and expanded P-EBT to include: 1) households with children whose schools reduce the number of days or hours that students attend school for at least five consecutive days during a public health emergency, 2) households with at least one child enrolled in a covered childcare facility and SNAP when the covered child care facility is closed or has reduced attendance or hours for at least five consecutive days during a public health emergency, and 3) households with at least one child enrolled in a covered childcare facility and SNAP when one or more schools in the area of the covered child care facility are closed or have reduced attendance or hours for at least five consecutive days during a public health emergency.

The USDA's Food and Nutrition Service (FNS or the Agency) works to end hunger and obesity through the Federal administration of 15 Federal nutrition assistance programs including the National School Lunch Program (NSLP), which provides free and reduced price lunches to eligible children, and the Supplemental Nutrition Assistance Program (SNAP), which provides nutrition benefits to supplement the food budgets of needy families so they can purchase healthy food and move towards self-sufficiency. FNS was, therefore, charged by Congress with the implementation of P-EBT at the Federal level. As of [INSERT DATE OF PUBLICATION IN

THE FEDERAL REGISTER], 52 States¹ have been approved by USDA to administer P-EBT. Collectively, these States have been approved to provide over 30.1 million eligible children with about \$10.1 billion in food assistance benefits.

Section 1101(d) of the FFCRA provided States the option to deliver P-EBT benefits via the Electronic Benefit Transfer (EBT) system established for SNAP benefits by Section 7 of the Food and Nutrition Act of 2008 (FNA; 7 U.S.C. 2016). All States, as defined by this rule, that have implemented P-EBT have opted to use the EBT system for such delivery.

Routine Operation of SNAP Benefit Issuance and Redemption

SNAP benefits are issued and redeemed using the EBT system. Each SNAP household has an account into which SNAP benefits are issued on a monthly basis. The SNAP benefits are accessed by a household using an EBT card and a personal identification number (PIN), and may only be used to purchase SNAP eligible food as defined in 7 CFR 271.2.

In addition, SNAP benefits may only be redeemed at firms² authorized by USDA to accept SNAP benefits. Per Section 9 of the FNA (7 U.S.C. 2018) and 7 CFR 278.1(a), firms must apply to and be authorized by the Department to accept SNAP benefits as a form of payment. The

¹ All 50 states, the District of Columbia, the U.S. Virgin Islands, and Guam are referred to as “States” for this rule, and all 53 States (as defined in section 3(r) of the Food and Nutrition Act) were eligible to administer P-EBT under section 1101 of FFCRA as originally enacted. Of those 53, only 52 have requested P-EBT. While the CR extended the option to receive P-EBT benefits to other State Agencies not covered by the original FFCRA—Puerto Rico, American Samoa, and the Northern Mariana Islands--these territories manage retailer participation as a part of their block grants. Retailers in these territories are not currently subject to 7 CFR part 278 and would not be subject to 7 CFR part 284. As such, for purposes of this rule, they are not included in any reference to States or State Agencies.

² As defined at 7 CFR 271.2.

Department is responsible for policy and oversight related to firm eligibility, authorization, and compliance. USDA oversight includes integrity efforts such as findings of violations on the basis of evidence obtained through on-site investigations, inconsistent SNAP redemption data, and evidence obtained through a transaction report under the EBT system. Per 7 CFR 278.1, 278.6, and 278.7, firms that violate SNAP rules may face the following:

<i>Adverse Administrative Actions</i>
<ul style="list-style-type: none"> • Denial (a firm applying for SNAP authorization is found ineligible and may not reapply for a specific period) • Withdrawal (an authorized firm is found ineligible, removed from the program, and may not reapply for a specific period) • <i>Penalties (imposed after an investigation revealed violations):</i> <ul style="list-style-type: none"> ➤ Warning Letter (the violations found at the firm do not rise to the level of a sanction, so the firm is only warned) ➤ <i>Sanctions (the violations found at the firm are serious, so the firm is subject to a sanction):</i> <ul style="list-style-type: none"> ○ Claim (the firm must repay illicitly obtained benefits) ○ Disqualification (the firm may not participate in the program for a specific period) ○ <i>Civil Money Penalty (CMP; the firm must pay a fine)</i> <ul style="list-style-type: none"> ▪ Hardship CMP (a firm facing a term disqualification in a low food access area may pay a fine and continue to participate in the program) ▪ Transfer of Ownership CMP (a firm is sold while serving a period of disqualification and must pay a fine) ▪ Trafficking CMP (a firm meeting certain criteria may pay a fine in lieu of permanent disqualification for trafficking)

One of the most serious violations of SNAP rules for firms is *trafficking*. SNAP regulations at 7 CFR 271.2 currently define the violation of *trafficking*. *Trafficking* usually means the exchange of SNAP benefits for cash or other consideration and carries more serious sanctions for firms. The Department monitors and takes appropriate administrative action, including sanctions, against firms that engage in trafficking and other violations. USDA cannot fulfill its primary purpose of helping individuals and families in need afford a basic diet without maintaining strong program integrity. USDA takes its role as a steward of public funds seriously and emphasizes program integrity throughout all program operations, including the use of a fraud detection system to analyze data on EBT transactions conducted at firms.

Implementation of P-EBT and Interaction with SNAP

Per Section 1101(d) of the FFCRA, P-EBT benefits may be issued through the same EBT system established by Section 7 of the FNA (7 U.S.C. 2016) which is used to issue SNAP benefits. To accelerate the implementation of P-EBT, ease administrative burden for States, and more rapidly provide emergency financial relief to families, States generally issued P-EBT benefits onto a household's existing EBT card if the household was already receiving SNAP benefits (and therefore already possessed an EBT card).

Initially, the Department planned to implement P-EBT using a model similar to that used for certain Child Nutrition Summer EBT demonstration projects (Summer EBT for Children or SEBTC) as authorized by the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (Pub. L. 111-80). In this SEBTC model, benefits

are issued to a participant's existing EBT card into an account distinct from SNAP, and the SEBTC benefits remain separate from SNAP benefits throughout the issuance and redemption process. However, because this SEBTC model was only ever implemented as a demonstration project in 7 States, most States were not already equipped with the infrastructure needed to implement P-EBT in the same manner.

Due to the experience administering these SEBTC demonstration projects, USDA determined that it would take several months to modify SNAP State Agency eligibility and issuance systems to accommodate this type of model for P-EBT. In addition, due to the ongoing and national COVID-19 Public Health Emergency, SNAP State Agencies found themselves extremely short-staffed and unable implement this type of major system modification.

After consultation with SNAP State Agencies, and in light of the urgency of the ongoing and national COVID-19 Public Health Emergency, USDA permitted States to issue SNAP and P-EBT benefits using essentially the same existing SNAP EBT mechanism every State already had in place. As a result of this, however, P-EBT and SNAP benefits are generally indistinguishable throughout the issuance and redemption process.

Under the process implemented by States, P-EBT benefits were generally issued onto a household's existing EBT card if the household was already receiving SNAP benefits (and therefore already possessed an EBT card). Such SNAP households would have received P-EBT benefit issuances into their existing SNAP accounts. Once P-EBT benefits were issued into households' existing SNAP accounts, P-EBT benefits and SNAP benefits became comingled,

and neither SNAP households receiving P-EBT benefits nor firms accepting P-EBT benefits were able to tell the difference between these two types of benefits. In at least one State, new cards were sent to all P-EBT recipient households, regardless as to their participation in SNAP.

Non-SNAP households that were eligible for P-EBT benefits generally received EBT cards in the mail that were loaded with only P-EBT benefits. These cards issued to non-SNAP households functioned identically to the EBT cards provided to SNAP households.

Despite using the same delivery and funding mechanism, P-EBT benefits are not SNAP benefits. SNAP was authorized and is governed by the FNA, while P-EBT was separately created and is governed by the FFCRA with separate appropriations for a different purpose – to provide supplemental allotments to households with children who would have otherwise received free or reduced school meals, but for school closures related to the ongoing and national COVID-19 Public Health Emergency. *See* Section 1101 of the FFCRA. Nevertheless, the aforementioned implementation mechanisms rendered P-EBT and SNAP benefits essentially indistinguishable for benefit issuance and redemption purposes.

Purpose of the Final Rule

Because P-EBT and SNAP benefits are essentially indistinguishable for benefit issuance and redemption purposes when the benefits are loaded onto the same EBT card, neither SNAP households receiving P-EBT benefits nor firms accepting P-EBT benefits are able to tell the

difference between these two types of benefits. At the same time, the Department's SNAP fraud detection system also cannot distinguish between these two types of benefits.

In addition, as discussed earlier, 7 CFR parts 271 and 278 provide for adverse administrative actions against firms for SNAP violations, such as trafficking, but those regulations govern violations involving SNAP benefits, not P-EBT benefits. Since P-EBT benefits are not SNAP benefits, existing regulations regarding the appropriate use of SNAP benefits and the consequences for misusing those benefits do not apply to P-EBT benefits, and there are currently no such provisions for the misuse of P-EBT benefits. However, USDA finds it appropriate and necessary to impose certain restrictions on the use of P-EBT benefits for several reasons described below.

Congress initially authorized P-EBT as food assistance for households with children who lost free or reduced price school meals and since then, as mentioned previously, has greatly expanded P-EBT's scope. P-EBT benefits are not cash assistance, nor are they intended for misuse such as trafficking. As a type of replacement for the value of meals at schools or covered child care facilities,³ P-EBT is not intended for certain incongruous uses, including the purchase of nonfood items such as alcohol and tobacco. To safeguard the integrity of P-EBT (as well as SNAP), this final rule will ensure that the Department can hold firms accountable by aligning P-EBT with

³ As authorized by the originally enacted Section 1101(b) of FFCRA and explained in *Pandemic EBT (P-EBT) Questions and Answers* (April 15, 2020) (available at: <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAP-COVID-PEBTQA.pdf>), the guidelines for P-EBT benefit amounts were based on the value of the rates for free school meals. All States that issued P-EBT benefits after the original enactment of the FFCRA did so in amounts corresponding to the value of the rates for free school meals. The CR subsequently amended Section 1101(i) of the FFCRA to define "free rate" separately for breakfast and lunch, based on the rates of those free meals under Section 4 of the Child Nutrition Act of 1966 and the Richard B. Russell National School Lunch Act, respectively.

certain existing SNAP integrity regulations. The Department believes that providing an integrity scheme for P-EBT helps ensure that P-EBT benefits are used for their intended purpose, upholding the Congressional intent of both the FFCRA and the CR.

The inability to impose penalties on all firms for misuse of P-EBT benefits undermines USDA's oversight and integrity efforts, and would also adversely affect SNAP oversight and integrity. For example, in FY 2019, USDA identified and sanctioned more than one thousand firms engaged in the trafficking of SNAP benefits.⁴ The overwhelming majority of these cases were built, at least in part, using the Department's SNAP fraud detection system's transaction data. Since the Department's SNAP fraud detection system cannot distinguish between SNAP and P-EBT benefits in transaction data, USDA would be unable to use this vital data in program integrity work without considerable time-consuming modifications and resources, or the promulgation of this final rule.

Without this final rule, USDA's ability to hold violators accountable would be adversely impacted. To illustrate the impact on USDA's oversight efforts, a 2017 report regarding trafficking activities from 2012 through 2014 revealed that approximately 12 percent, or about 36,000 firms, engaged in trafficking, totaling approximately \$1.1 billion a year or about 1.5% of all benefits redeemed. If USDA were unable to use EBT transaction data as is typically done for detecting trafficking and sanctioning trafficking firms, then as many as a thousand fewer firms

⁴ Data drawn from USDA's "Fiscal Year 2019 Year End Summary" (<https://fns-prod.azureedge.net/sites/default/files/resource-files/2019-SNAP-Retailer-Management-Year-End-Summary.pdf>).

engaging in trafficking would be identified and sanctioned in a year.⁵ This would mean that such firms would be able to continue to commit trafficking violations without consequence, resulting in as much as \$31 million in fraud a year that would remain unchecked.⁶

The purpose of P-EBT was to provide financial relief to families in the midst of the ongoing national COVID-19 Public Health Emergency. USDA prioritized expediting the implementation of P-EBT in States that applied. However, while making expeditious implementation possible, the co-mingling of SNAP and P-EBT benefits inadvertently introduced this anomaly into FNS integrity efforts.

If USDA did not promulgate this final rule, then USDA would not be able to efficiently and effectively address misuse by firms of P-EBT benefits or SNAP benefits, and both P-EBT and SNAP program integrity would be adversely impacted. Assuming that P-EBT benefits are trafficked at a rate similar to SNAP benefits, USDA estimates that \$151 million in P-EBT benefits could be trafficked.⁷ Currently, USDA estimates that about 3 percent of actual EBT fraud is detected through investigations that utilize EBT transaction data. The limited ability to use this data would potentially cause this fraud to go unchecked, which would constitute a serious integrity issue. Furthermore, because P-EBT benefits may remain in a household's

⁵ Data drawn from USDA's "Fiscal Year 2019 Year End Summary" (<https://fns-prod.azureedge.net/sites/default/files/resource-files/2019-SNAP-Retailer-Management-Year-End-Summary.pdf>).

⁶ The 2012-2014 retailer trafficking study estimated that about 36,000 retailers engage in trafficking totaling about \$1.1 billion a year (reflecting about 1.5% of benefits redeemed). Using an arithmetic mean, the average trafficking retailer traffics about \$31,000 in a year. USDA identified and sanctioned about 1,000 firms for trafficking in FY 2019 using EBT transaction data analysis as an investigative tool. If this USDA work were hampered, then these firms could continue trafficking activities at the same or a greater rate, resulting in as much as \$31 million in trafficking being unchecked.

⁷ Total P-EBT benefit issuance is about \$10.1 billion and the estimated 2012-2014 SNAP retailer trafficking rate is 1.5% of benefits redeemed.

account for months or even years before being expunged, USDA must address these integrity problems; otherwise, they could persist for months or even years after the issuance of P-EBT benefits.⁸ This final rule is crucial in allowing USDA to address trafficking in a timely manner and ensuring P-EBT benefits, as well as SNAP benefits, are used in a manner consistent with Congressional intent.

This final rule allows USDA to immediately address the integrity issues, instead of prolonging them and allowing for bad actors to discover the anomaly and take advantage of it. If USDA were to notify the public of these integrity issues without implementing a comprehensive solution, then such a notice would subvert program integrity. By promulgating this final rule, USDA is ensuring that traditional mechanisms of ongoing and robust firm oversight and enforcement are maintained to protect the integrity of both P-EBT and SNAP and that the current lack of P-EBT integrity regulations is addressed without further unnecessary and harmful delay. This will allow USDA to continue detecting and pursuing administrative remedies to ensure there is no increase in trafficking and other violations.

Importantly, given the urgency of the issue, it is most efficient for P-EBT regulations to adopt the structure and meaning of SNAP regulations instead of crafting an entirely new regulatory scheme and implementing massive system changes that would accompany such a new regulatory

⁸ For administrative ease, most States chose to issue P-EBT benefits such that these benefits would only be expunged from beneficiaries' SNAP accounts after a continuous 365-day period of inactivity per SNAP standards at 7 CFR 274.2(h)(2) as they were when P-EBT State Plans were submitted. Every time a beneficiary accesses their benefits, this 365-day expungement clock is reset. Some beneficiaries may choose to conserve their P-EBT benefits, using them sparingly over a protracted period. Therefore, although P-EBT is currently authorized through September 30, 2020, P-EBT benefits could remain on EBT cards years after that date.

scheme. Such separate undertakings solely for P-EBT are impractical and potentially ineffective because of the time, cost, and effort involved.

For the reasons discussed, this final rule establishes integrity regulations (as enumerated in this final rule) for P-EBT benefits as detailed further below in the “Summary of P-EBT Regulations” section.

Summary of P-EBT Regulations

This final rule establishes that P-EBT benefits issued pursuant to Section 1101 of the FFCRA, as amended by the Continuing Appropriations Act, 2021 and Other Extensions Act (CR; Pub. L. 116-159) or any subsequent legislation, are subject to integrity regulations, as enumerated below. This change will ensure that P-EBT (as well as SNAP) is administered in a manner that safeguards against fraud and abuse. This final rule renames the previously reserved part 284 as “Miscellaneous” and creates § 284.1, titled “Pandemic Electronic Benefits Transfer (P-EBT),” therein.

The following crosswalk summarizes the provisions of this new § 284.1. The left column lists the citation for each final rule provision, the center column summarizes the effect of the provision, and the right column indicates the preexisting SNAP integrity regulation to which the final rule provision refers. In using phrases such as “involving P-EBT benefits”, the Department means that the activity at issue involves P-EBT benefits as well as SNAP benefits, or only P-EBT benefits. Under 7 CFR 278.6, a firm that commits serious violations may be subject to a

period of disqualification or a civil money penalty. Under this final rule, if a firm commits violations involving P-EBT benefits (e.g., trafficking only P-EBT benefits or trafficking a combination of P-EBT and SNAP benefits), then that firm shall be subject to the appropriate sanction (e.g., permanent disqualification or a civil money penalty in lieu of permanent disqualification). Firms shall not be subject to multiple sanctions for a single investigation that involves both P-EBT and SNAP benefits (i.e., firms shall not be subject to one sanction for misuse of P-EBT benefits and a separate sanction for misuse of SNAP benefits based on a single investigation).

While this final rule promulgates provisions for P-EBT benefits that generally track the corresponding SNAP benefit provisions, one exception is the P-EBT benefits provision concerning judicial review. As P-EBT benefits arise from FFCRA, as amended regulations at § 284.1(g) will provide for judicial appeal rights pursuant the Administrative Procedure Act (5 U.S.C. 702 through 706) as opposed to section 14 of the FNA. Currently, judicial review requests for civil cases filed pursuant to the Administrative Procedure Act have a six-year statute of limitations. *See* 28 U.S.C. 2401(a).

Citation in this Final Rule	Purpose of Final Rule Provision	Reference to Preexisting Regulation
7 CFR 284.1(a)	background on P-EBT and the function of this section	n/a
7 CFR 284.1(b)(1)	definition of <i>trafficking</i> applies to activities described in such definition involving P-EBT benefits	7 CFR 271.2
7 CFR 284.1(b)(2)	definition of <i>firm's practice</i> applies to activities described in such definition involving P-EBT benefits	7 CFR 271.2
7 CFR 284.1(b)(3)	definition of <i>involving P-EBT benefits</i> or <i>involve P-EBT benefits</i> means	n/a

Citation in this Final Rule	Purpose of Final Rule Provision	Reference to Preexisting Regulation
	activities involving P-EBT benefits as well as SNAP benefits, or only P-EBT benefits	
7 CFR 284.1(c)	requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons apply to activities involving P-EBT benefits, including the restriction that P-EBT benefits may only be accepted by an authorized firm and only in exchange for eligible food	7 CFR 278.2, 278.3, and 278.4
7 CFR 284.1(d)	a firm may be subject to denial or withdrawal for any violations involving P-EBT benefits as specified in the subparagraphs	7 CFR 278.1
7 CFR 284.1(d)(1)	firms with certain sanctions for violations involving P-EBT benefits must submit a collateral bond or irrevocable letter or credit as a condition of authorization; the calculation of the value of such collateral bonds or irrevocable letters or credit shall also include the amount of P-EBT redemptions	7 CFR 278.1(b)(4)
7 CFR 284.1(d)(2)	authorization will be denied or withdrawn for activities indicating a lack of necessary business integrity and reputation, including activities involving P-EBT benefits	7 CFR 278.1(b)(3), (k)(3) and (6), and (l)(1)(iv)
7 CFR 284.1(d)(3)	authorization will be denied or withdrawn for failure to pay fines, penalties, and claims imposed for violations involving P-EBT benefits	7 CFR 278.1(k)(7) and (l)(1)(v) and (vi)
7 CFR 284.1(e)	a firm may be subject to disqualification, monetary penalties, and/or fines for any violations that include activities involving P-EBT benefits as specified in the subparagraphs	7 CFR 278.6
7 CFR 284.1(e)(1)	permanent disqualification or civil monetary penalty in lieu of permanent disqualification for trafficking applies	7 CFR 278.6(e)(1)(i) and (i)

Citation in this Final Rule	Purpose of Final Rule Provision	Reference to Preexisting Regulation
	to trafficking that involves P-EBT benefits	
7 CFR 284.1(e)(2)	permanent disqualification for violations involving P-EBT benefits, such as the sale of ineligible items, when the firm had already been sanctioned at least twice	7 CFR 278.6(e)(1)(ii)
7 CFR 284.1(e)(3)	sanctions for unauthorized acceptance apply to transactions involving P-EBT benefits	7 CFR 278.6(e)(2)(v), (e)(3)(iv), and (m)
7 CFR 284.1(e)(4)	5-year disqualification for certain firms when collective redemptions exceed food sales in a certain time period; the amount of redemptions shall also include the amount of P-EBT redemptions	7 CFR 278.6(e)(2)(ii), (iii), and (iv)
7 CFR 284.1(e)(5)	3-year disqualification for any of the violations described in § 278.6(e)(2) when FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations, when those violations involve P-EBT benefits	7 CFR 278.6(e)(3)(ii)
7 CFR 284.1(e)(6)	1-year disqualification for transactions involving P-EBT benefits where retailer accepted benefits in payment for items sold on credit	7 CFR 278.6(e)(4)(ii) and 278.2(f)
7 CFR 284.1(e)(7)	disqualifications for sale of ineligible foods applies to transactions involving P-EBT benefits	7 CFR 278.6(e)(2)(i), (e)(3)(i), (e)(4)(i), and (e)(5)
7 CFR 284.1(e)(8)	periods of disqualification imposed against firms will be doubled when such firms have been sanctioned for committing violations involving P-EBT benefits	7 CFR 278.6(e)(6)
7 CFR 284.1(e)(9)	warning letters shall be issued to firms when such firms commit violations involving P-EBT benefits, which are too limited to warrant a period of disqualification	7 CFR 278.6(e)(7)
7 CFR 284.1(e)(10)	calculation of hardship and transfer of ownership civil money penalties includes consideration of the firm's	7 CFR 278.6(g)

Citation in this Final Rule	Purpose of Final Rule Provision	Reference to Preexisting Regulation
	average monthly redemption of P-EBT benefits	
7 CFR 284.1(e)(11)	calculation of trafficking civil money penalties includes consideration of the firm's average monthly redemption of P-EBT benefits	7 CFR 278.6(j)
7 CFR 284.1(f)	standards regarding the determination and disposition of claims apply to claims based on P-EBT benefits	7 CFR 278.7
7 CFR 284.1(g)	firms aggrieved by administrative action under §284.1(d), (e), and (f) may request administrative review in accordance with part 279, subpart A. Firms aggrieved by the determination of such an administrative review may seek judicial review under 5 U.S.C. 702 through 706.	7 CFR part 279

PROCEDURAL MATTERS:

Administrative Procedure Act (APA) Statement

The Administrative Procedure Act of 1946, as amended (APA; 5 U.S.C. 553), generally requires that agencies go through notice-and-comment rulemaking before finalizing regulations and have a 30-day delayed effective date for final rules. The APA, however, allows for exemptions to these requirements. This final rule is being promulgated under one of these exemptions, as described below.

APA Exemption for Rules Pertaining to Benefits

The APA provides that the notice-and-comment and 30-day delay in the effective date provisions do not apply when a rule concerns “a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. 553(a)(2). P-EBT is a food

assistance benefit created by the FFCRA and, therefore, USDA has the authority under FFCRA to issue a final rule pertaining to P-EBT without notice-and-comment or a delayed effective date.⁹

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both cost and benefits, of reducing cost, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has reviewed this final rule and determined that it is not significant under Executive Order 12866 (E.O. 12866). E.O. 12866 defines a “significant regulatory action” as one that is likely to: (1) have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal

⁹ Previously, USDA utilized APA notice-and-comment rulemaking procedures regardless of the APA exemption for benefits, pursuant to the “Public Participation in Rule Making: Statement of Policy” (Statement of Policy), published on July 24, 1971 (36 FR 13804). However, this Statement of Policy was rescinded in 2013. 78 FR 64194 (Oct. 28, 2013). Additionally, while Section 4(c) of the FNA (7 USC 2013(c)) generally requires USDA FNS to comply with the APA requirements when promulgating SNAP regulations under the FNA, this final rule is promulgated under the FFCRA, not the FNA. Therefore, this final rule regarding P-EBT benefits is exempt from the APA notice-and-comment and 30-day delay in the effective date provisions under 5 U.S.C. 553(a)(2). Furthermore, while notice-and-comment rulemaking remains an option for matters involving benefits, USDA is choosing to promulgate a final rule for P-EBT benefits under the authority in 5 U.S.C. 553(a)(2) because the additional time to undergo notice-and-comment would further undermine integrity. Firms are already subject to certain requirements regarding the redemption of SNAP benefits on EBT cards; therefore, carrying over those requirements to P-EBT benefits that are often comingled with SNAP benefits on the same EBT cards does not warrant departure from 5 U.S.C. 553(a)(2).

governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. This final rule does not meet any of these criteria.

The Department does not anticipate that this final rule will impose any additional costs on firms, beneficiary households, SNAP State Agencies, or any other stakeholders. USDA estimates that failure to promulgate and implement this final rule would significantly hamper the agency's ability to enforce regulation and law in maintaining SNAP integrity. USDA considered the regulatory alternatives of taking no action or promulgating this final rule instead as a notice of proposed rulemaking, but these approaches were rejected for the reasons provided in the preamble. As this rule was designated not significant, no additional regulatory impact analysis has been performed for this rule.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA) generally requires that agencies must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such an analysis in the Federal Register. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such an analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not

dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” The Department hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Congressional Review Act

Pursuant to the Congressional Review Act (CRA; Pub. L. 104-121), OMB has designated this action as not a major rule, as defined by 5 U.S.C. 804(2). The CRA defines a “major rule” as any rule that has resulted in or is likely to result in: an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Order 13771

Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that the cost of planned regulations be prudently managed and controlled through a budgeting process. This rule is not an EO 13771 regulatory action because it is not significant under EO 12866.

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988 (E.O. 12988), Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This final rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Executive Order 12372, Intergovernmental Review

Executive Order 12372 (E.O. 12372) requires intergovernmental consultation with State and local governments that would provide non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance or direct Federal development. This is a final rule regarding benefits fully funded by the Federal Government and is therefore excluded from the scope of E.O. 12372.

Executive Order 13132, Federalism

Executive Order 13132 (E.O. 13132) requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, imposes substantial direct compliance costs on State and local government, and are not required by statute, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of E.O. 13132.

The Department has considered the impact of this final rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, a federalism impact summary is not required.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 (E.O. 13175) requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Department has considered the impact of this final rule on Indian Tribes and has determined that this rule does not have Tribal implications. Although Tribal consultation and coordination is not required under E.O. 13175, USDA commits to review of this rule at the Department's next scheduled Tribal listening session in case unexpected Tribal government issues or concerns emerge during implementation.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires the Office of Management and Budget (OMB) approve collections of information by a Federal agency before they can be implemented.

In accordance with 44 U.S.C. 3518(c)(1)(B)(ii), any information requests or requirements in this rule are not subject to the requirements of the Paperwork Reduction Act because such collections

of information are pursuant to an administrative action or investigation by an agency of the United States against specific individuals or entities. The Secretary hereby certifies that this rule does not impose reporting or recordkeeping requirements subject to the approval by the Office of Management and Budget under the requirements of the Paperwork Reduction Act.

E-Government Act Compliance

USDA is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. An electronic copy of this final rule will be made available through the agency's website.

Unfunded Mandates Reform Act

This final rule contains no Federal mandates (under the regulatory provision of title II of the Unfunded Mandates Reform Act of 1995) for State, local, and Tribal governments or the private sector. Therefore, this final rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act.

Civil Rights Impact Analysis

USDA FNS has reviewed this final rule in accordance with USDA Regulation 4300-4, "Civil Rights Impact Analysis," to identify any major civil rights impacts this final rule might have on SNAP or P-EBT participants on the basis of age, race, color, national origin, sex or disability. After review and analysis of the final rule and available data, it has been determined that this final rule will neither adversely nor disproportionately impact any protected group. As this final

rule has not been designated a “significant regulatory action,” a separate Civil Rights Impact Analysis (CRIA) is not required per Section 7(a) of USDA Regulation 4300-4, “Civil Rights Impact Analysis.”

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotope, American Sign Language) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.ascr.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide in the letter

all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250-9410; (2) fax: (202) 690-7442; or (3) email: program.intake@usda.gov.

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List of Subjects in 7 CFR Part 284

Administrative practice and procedure, Food stamps, Grant programs-social programs, Pandemic, Penalties.

For the reasons set out in the preamble, 7 CFR part 284 is added to read as follows:

PART 284—MISCELLANEOUS

Sec.

284.1 Pandemic Electronic Benefits Transfer (P-EBT).

284.2 [Reserved]

Authority: Pub. L. 116-127, 134 Stat. 178.

§284.1 Pandemic Electronic Benefits Transfer (P-EBT).

(a) *Overview.* Section 1101 of the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127), as amended, authorized supplemental allotments to certain households. These benefits shall be referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits throughout this section. This section establishes the retailer integrity regulations

for P-EBT for retailers in any State as defined in Section 3(r) of the Food and Nutrition Act.

(b) *Definitions.* For this section:

(1) *Trafficking* means the activities described in the definition of trafficking at §271.2 of this chapter when such activities involve P-EBT benefits.

(2) *Firm's practice* means the activities described in the definition of firm's practice at §271.2 of this chapter when such activities involve P-EBT benefits.

(3) *Involving P-EBT benefits or involve P-EBT benefits* means activities involving P-EBT benefits as well as supplemental nutrition assistance program (SNAP) benefits, or only P-EBT benefits.

(c) *Participation of retail food stores and wholesale food concerns, and redemption of P-EBT benefits.* Requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons described at §§ 278.2, 278.3 and 278.4 of this chapter, including the acceptance of coupons for eligible food at authorized firms, also apply to activities involving P-EBT benefits.

(d) *Firm eligibility standards.* A firm may be subject to the following actions described at §278.1 of this chapter for noncompliance or violations involving P-EBT benefits:

(1) The requirements described at §278.1(b)(4) of this chapter regarding a collateral bond or irrevocable letter of credit for applicant firms with certain sanctions apply to applicant firms with sanctions imposed for violations involving P-EBT benefits. The amount of the collateral bond or irrevocable letter of credit shall be calculated in accordance with §278.1(b)(4)(i)(D) and shall also include the amount of P-EBT benefit redemptions when calculating the average monthly benefit redemption volume.

(2) Authorization shall be denied or withdrawn based on a determination by the Food and Nutrition Service (FNS) that a firm lacks or fails to maintain necessary business integrity and reputation, in accordance with the standards and time periods described at §278.1(b)(3), (k)(3), and (l)(1)(iv) of this chapter. When making such determinations, FNS shall consider the criteria referred to in §278.1(b)(3), (k)(3), and (l)(1)(iv) where the underlying activities involve P-EBT benefits.

(3) Firm authorization shall be denied or withdrawn for failure to pay any claims, fines, or civil money penalties in the manner described at §278.1(k)(7) and (l)(1)(v) and (vi) of this chapter where such sanctions were imposed for violations involving P-EBT benefits.

(e) *Penalties.* For firms that commit certain violations described at §§278.6 and 278.2 of this chapter where such violations involve P-EBT benefits, FNS shall take the corresponding action prescribed at §278.6 or §278.2 for that violation. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. Specifically, FNS shall:

(1) Disqualify a firm permanently, as described at §278.6(e)(1)(i) of this chapter , for trafficking , as defined at §284.1(b)(1) of this chapter , or impose a civil money penalty in lieu of permanent disqualification, as described at §278.6(i) of this chapter, where such compliance policy and program is designed to prevent violations of regulations of this section;

(2) Disqualify a firm permanently, as described at §278.6(e)(1)(ii) of this chapter, for any violation involving P-EBT benefits committed by a firm that had already been sanctioned at least twice before under this section or part 278 of this chapter;

(3) Disqualify the firm for 5 years, as described at §278.6(e)(2)(v) of this chapter, or for 3 years, as described at §278.6(e)(3)(iv) of this chapter , for unauthorized acceptance violations involving P-EBT benefits, and impose fines, as described at §278.6(m) of this chapter, for unauthorized acceptance violations involving P-EBT benefits;

(4) Disqualify the firm for 5 years in circumstances described at §278.6(e)(2) of this chapter when the amount of redemptions, which shall also include the amount of P-EBT redemptions, exceed food sales for the same period of time, as described at §278.6(e)(2)(ii), (iii), and (iv);

(5) Disqualify the firm for 3 years as described at §278.6(e)(3)(ii) of this chapter for situations described at §278.6(e)(2) of this chapter involving P-EBT benefits;

(6) Disqualify the firm for 1 year for credit account violations as described at §§278.6(e)(4)(ii) and 278.2(f) of this chapter, where such violations involve P-EBT benefits;

(7) Disqualify the firm for ineligible violations for such circumstances and corresponding time periods as described at §278.6(e)(2)(i), (e)(3)(i), (e)(4)(i), and (e)(5) of this chapter, where such violations involve P-EBT benefits;

(8) Double the appropriate period of disqualification for a violation, as described at §278.6(e)(6) of this chapter, where such violation involves P-EBT benefits, when the firm has once before been assigned a sanction under this section or part 278 of this chapter;

(9) Issue a warning letter to the violative firm when violations are too limited to warrant a period of disqualification, as described at §278.6(e)(7) of this chapter, where such violations involve P-EBT benefits;

(10) Impose a civil money penalty for hardship or transfer of ownership, as described at §278.6(g) of this chapter, in amounts calculated using the described formula at §278.6(g), which shall also include the relevant amount of P-EBT redemptions when calculating the average monthly benefit redemptions; and

(11) Impose a civil money penalty in lieu of permanent disqualification for trafficking as described at §278.6(j) of this chapter in an amount calculated using the described formula

at §278.6(j), which shall also include the relevant amount of P-EBT redemptions when calculating the average monthly benefit redemptions.

(f) *Claims.* The standards for determination and disposition of claims described at §278.7 of this chapter apply to P-EBT benefits.

(g) *Administrative and Judicial review.* Firms aggrieved by administrative action under paragraphs (d), (e), and (f) of this section may request administrative review of the administrative action with FNS in accordance with part 279, subpart A, of this chapter. Firms aggrieved by the determination of such an administrative review may seek judicial review of the determination under 5 U.S.C. 702 through 706.

§284.2 [Reserved]

Pamilyn Miller,
Administrator,
Food and Nutrition Service.